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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 BALLARD MARINE CONSTRUCTION,
11 INC.,

12 Plaintiff,

13 v.

14 EHW CONSTRUCTORS, a Joint Venture;
15 SKANSKA USA CIVIL, INC.;
16 AMERICAN BRIDGE COMPANY; and
17 NOVA GROUP, INC.,

18 Defendants.

The Honorable Ronald B. Leighton

No. 3:16-cv-05633-RBL

STIPULATED MOTION TO SEAL
CONTROLLED NUCLEAR
INFORMATION AND ORDER
THEREON

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23 **I. CLERK'S ACTION REQUESTED**

24 The Clerk is requested to replace Dkt. #25 in this cause of action and all
25 attachments thereto with the redacted version of Dkt. #25 attached to the Declaration of
Scott MacDonald filed herewith as Exhibit B. The Clerk is further requested to redact
Exhibit A to the Declaration of Scott MacDonald from the public record, and retain the
unredacted version of Exhibit A under seal.

II. RELIEF REQUESTED

Defendant EHW Constructors ("EHW") and Plaintiff Ballard Marine
Construction, Inc. ("BMC") respectfully request that this Court replace BMC's Motion

STIPULATED MOTION AND ORDER TO SEAL
CONTROLLED NUCLEAR INFORMATION – 1

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1 for Partial Summary Judgment and attachments filed thereto (Dkt. #25) with the
2 redacted version of Dkt. #25 attached as Exhibit B to the Declaration of
3 Scott MacDonald filed herewith, as well as redact Exhibit A to the Declaration of Scott
4 MacDonald from the public record while retaining the unredacted version of Exhibit A
5 under seal.

6 The Prime Contract documents at issue in this dispute have been designated by
7 the United States Department of Defense (“DoD”) as Unclassified Controlled Nuclear
8 Information (“UCNI”) pursuant to 10 U.S.C. § 128 and 32 CFR § 223.6. Portions of
9 the Prime Contract are excerpted in part and attached in full at Dkt. #25. The
10 Declaration of Scott MacDonald filed herewith also appends a portion of the Prime
11 Contract, attached as Exhibit A. UCNI material can only be accessed by United States
12 citizens after signing a certificate of non-disclosure, and may not be posted on-line for
13 viewing by the general public. Decl. of Scott MacDonald (“MacDonald Decl.”), Ex. A
14 at Section 00800(7.1).

15 II. STATEMENT OF FACTS

16 A. UCNI Designation.

17 The construction Project at issue in this matter is the MCON P-990 Explosives
18 Handling Wharf project. The Prime Contract states that the Project is classified as DoD
19 UCNI. MacDonald Decl., Ex. A § 00800(7.1). Accordingly, access to Prime Contract
20 documents is restricted to “United States Citizens with a need-to-know” and requires
21 the signing of a certificate of non-disclosure. *Id.* The Subcontract references the UCNI
22 designations and protections required thereby.¹ UCNI materials cannot be placed online
23 or in the public domain for unrestricted access by the general public.

24
25 _____
¹ Dkt. #15-1 (the “Subcontract”) Appx. A “General Requirements” ¶ 19.

1 **III. ISSUES PRESENTED**

2 Whether Dkt. #25 and Exhibit A to the Declaration of Scott MacDonald filed
3 herewith should be sealed to avoid dissemination of UCNI materials.

4 **IV. EVIDENCE RELIED UPON**

5 Plaintiff and Defendant jointly rely upon the pleadings and filings on record and
6 the Declaration of Scott MacDonald filed herewith.

7 **V. ARGUMENT AND AUTHORITY**

8 **A. Standard and Justification to Seal.**

9 LCR 5(g) recognizes the “strong presumption of public access to the court’s
10 files.” To override the presumption, a party must cite a “statute, rule, or prior court
11 order expressly authoriz[ing]” the document to be filed under seal,” and provide “a
12 specific statement of the applicable legal standard and the reasons for keeping a
13 document under seal, including an explanation of: (i) the legitimate . . . public interests
14 that warrant the relief sought; (ii) the injury that will result if the relief sought is not
15 granted; and (ii) why a less restrictive alternative to the relief sought is not sufficient.”
16 LCR 5(g)(3)(B).

17 *i. Statute or Rule Authorizing Sealing*

18 Congress granted the DoD authority to designate certain sensitive nuclear-
19 related documents as UCNI to keep them from public access. 10 U.S.C. § 128. The
20 DoD exercised that statutory grant of authority to enact 32 CFR § 223.6, promulgating
21 standards for the use of its regulatory authority in designating UCNI. Under this
22 statutory and regulatory authority, DoD declared all Prime Contract documents related
23 to the Project at issue to be UCNI, and by that determination ruled that such materials
24 must be withheld from public access. MacDonald Decl., Ex. A at Section 00800(7.1).

1 That same grant of authority justifies and necessitates the sealing of Dkt. #25 and the
2 Declaration of Scott MacDonald filed herewith.

3 *ii. Applicable Legal Standard*

4 As Dkt. #25 is a dispositive motion, the applicable legal standard is the
5 “compelling reasons” standard. *Center for Auto Safety v. Chrysler Group, LLC*, 809
6 F.3d 1092, 1096-97 (9th Cir. 2016). Under the “compelling reasons” standard, a court
7 may seal records when it finds “a compelling reason and articulates the factual basis for
8 its ruling, without relying on hypothesis or conjecture.” *Id.* (internal citations omitted
9 throughout). “What constitutes a compelling reason is best left to the sound discretion
10 of the trial court.” *Id.* Here, there is a compelling reason to seal UCNI documents in
11 light of Congress’s acknowledgement and DoD’s finding as to the specific documents
12 sought to be sealed that “unauthorized dissemination of [the Prime Contract
13 Documents] could reasonably be expected to result in a significant adverse effect on
14 the health and safety of the public or the common defense and security” by
15 “significantly increasing the likelihood of (i) illegal production of nuclear weapons, or
16 (ii) theft, diversion, or sabotage of nuclear materials, equipment, or facilities.” 10
17 U.S.C. § 128(a)(4)(B); 32 CFR § 223.6. Such heightened concerns over nuclear and
18 national security serve as a compelling reason to seal the requested documents.

19 *iii. Reasons for Sealing the Requested Documents per LCR 5(g)(3)(B)*

20 First, legitimate public interests warrant sealing the requested documents.
21 Congress delegated authority to the DoD to determine what materials constitute UCNI.
22 10 U.S.C. § 128(a)(1). The DoD and Department of the Navy determined that the
23 Prime Contract documents are UCNI materials. By virtue of that determination, the
24 DoD necessarily determined that “unauthorized dissemination of such information
25 could reasonably be expected to result in a significant adverse effect on the health and

1 safety of the public or the common defense and security” 10 U.S.C.
2 § 128(a)(4)(B). Thus, sealing the unauthorized dissemination of UCNI materials is
3 necessary to protect the health and safety of the public, thereby serving the legitimate
4 public interest. LCR 5(g).

5 Second, by classifying the Prime Contract documents as UCNI, the DoD
6 necessarily determined the injury that would result from unauthorized dissemination of
7 such materials. Specifically, unauthorized dissemination “significantly increase[es] the
8 likelihood of (i) illegal production of nuclear weapons, or (ii) theft, diversion, or
9 sabotage of nuclear materials, equipment, or facilities.” 10 U.S.C. § 128(a)(4)(B). Such
10 injury is sufficiently serious to override the presumption of public access to these
11 materials. LCR 5(g).

12 Finally, the redacted version of Dkt. #25 and redacting Exhibit A to the
13 Declaration of Scott MacDonald from the public record represent the least restrictive
14 method of meeting UCNI standards. Redaction occurs in the proposed document only
15 where provisions of the Prime Contract are attached or excerpted in full. There is no
16 lesser alternative to redaction authorized in these court rules or by the DoD, therefore
17 these documents must either be placed into the public record in full, or redacted as
18 presented in this stipulated motion.

19 It should be noted that sealing the requested materials will not unduly restrict
20 the Parties’ ability to argue their respective cases or otherwise cite or rely upon the
21 Prime Contract Documents, and there are no First Amendment concerns attached to the
22 sealing of these documents. At the same time, sealing the Plaintiff’s Motion will not
23 unduly burden the public’s interest in the open administration of justice, as the other
24 filings relevant to the dispositive Motion, including facts and legal authority in
25 response and reply thereto, remain unsealed and open for public review.

1 **VI. CONCLUSION**

2 For the foregoing reasons, EHW and BMC jointly request that the Court seal
3 the un-redacted version of Dkt. #25 and its attachments, to be replaced in the public
4 record with the redacted version at Exhibit B to the Declaration of Scott MacDonald, as
5 well as redact Exhibit A to the Declaration of Scott MacDonald filed herewith from
6 public record, as requested above.

7 **VII. CERTIFICATION PURSUANT TO LCR 5(g)(3)(a)**

8 By signing below, both Parties' certify that they met and conferred on
9 October 26, 2017 by email between Dan A. Brown, Meredith E. Dishaw, James R.
10 Lynch, and Scott D. MacDonald, and again on November 10, 2017 by telephone
11 between Meredith E. Dishaw, James R. Lynch, and Scott D. MacDonald, and reached
12 agreement on the need to redact portions of Dkt. #25 and Exhibit A to the Declaration
13 of Scott MacDonald filed herewith. The Parties' agreement is embodied in this
14 Stipulated request, and the requested relief represents what the Parties believe is the
15 least amount of material that can be filed under seal.

16 RESPECTFULLY SUBMITTED this 15th day of December, 2017.

17 **AHLERS CRESSMAN & SLEIGHT PLLC**

WILLIAMS, KASTNER & GIBBS PLLC

18
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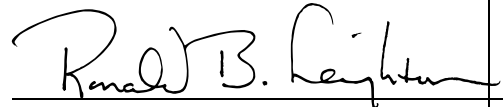
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1 **VIII. ORDER**

2 This matter having come before the Court upon the above Stipulated Motion of
3 the Parties, and with the Court having reviewed the Stipulated Motion and the records
4 and files herein, and otherwise deeming itself fully advised in the premises, it is now,
5 therefore,

6 ORDERED, ADJUDGED AND DECREED that, pursuant to LCR 5(g),
7 Dkt. #25 and the attachments thereto shall be replaced in the public record with the
8 redacted version of Dkt. #25 attached as Exhibit B to the Declaration of
9 Scott MacDonald, that the unredacted version of Dkt. #25 shall be kept for the Court's
10 eyes only, and the redacted version of the Declaration of Scott MacDonald shall be
11 filed in the public record under seal.

12
13 DONE IN OPEN COURT this 21st day of December, 2017.

14 

15 Ronald B. Leighton
16 United States District Judge

17 Jointly Presented By;
18 Notice of Presentation Waived:

19 **AHLERS CRESSMAN & SLEIGHT PLLC**

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